

## Legal News You Can Use

\* As many cooperatives consider an early payoff of the mortgage, there has been a lot of discussion on what happens to the Regulatory Agreement with HUD. Here are some points to ponder:

\* The Regulatory Agreement covers the entire property and continues until the final phase is paid off, according to Rod Hill of the Detroit HUD Office.

\* If your cooperative is a market rate co-op, payoff of the mortgage will end the Regulatory Agreement. Limited equity co-ops will be required to sign a Use Agreement that covenants that the essential elements of affordable housing will continue for the balance of the period that would have been covered by the HUD Regulatory Agreement.

\* HUD in Washington is developing a prototype Use Agreement that will mandate the terms; but up to this point, the Use Agreement has been negotiated by the local HUD offices and approved by Washington.

\* In refinancing the mortgage, we have found that HUD in Washington can be very helpful and that, in at least one instance, the local servicer was not knowledgeable. While normally we go to the local office first, we think that it is best to go straight to the HUD staff in Washington to get the approvals for the refinancing done. In one refinancing we recently completed, we were able to get the paperwork through HUD in a matter of two weeks!

If you are contemplating an early payoff, we will be happy to assist.

\* Good news on the share loan front: the National Cooperative Bank [NCB] advises that it is handling share loans so the incoming members can secure the money necessary to buy the shares. The amount available varies from 80% to 97 ½ % of the cost of the shares. The co-op will need to work out the terms of a Recognition Agreement with NCB or any other share lender.

Please call if you need help with this.

\* Many co-op bylaws contain a restriction on who can carry a proxy if a member is married. If the member is single, though, the typical clause says that any other co-op member may carry the proxy. HUD has ruled that this restriction discriminates against married people and thus violated Michigan law. You should remove this restriction from your bylaws.

\* If your co-op is struggling with a member who has violated your rules, there are occasions when you want to give him or her a second chance. Many times, the Board will meet with the offending member and will put him or her "on probation." There are, however, significant problems in doing this. Among them are:

\* Such a “probation” lacks teeth. If the member violates the rules again, you have to start from ground “zero” - a 30 day notice to quit has to be issued again, and the legal process reactivated. This can take months.

\* The evidence from the earlier violations become stale, and the impact on the judge or jury is lessened. This takes the edge off your case, unless the subsequent violation is severe.

We have been using an alternative that has worked rather successfully for our clients. It calls for the offending member to enter into a consent judgment that defines what will constitute a violation in clear terms. An eviction action is filed, and the judgment is signed by the judge. If there is another violation, we move quickly to obtain the writ of restitution without having to wait the normal time periods of the summary proceeding process. The member, by signing our consent judgment, agrees to give up a trial - either by judge or jury - and does not contest the basis for the original violation. It has worked well and has been a swift tool to rid the co-op of trouble, with minimal expense. Examples include:

\* A member whose children were creating nuisances - she signed the consent judgment and when she failed to control them a second time, we simply asked the court to process the writ of restitution. There was no trial and she was gone in a matter of days.

\* Another member disputed the claim that she did not live there. The board said “Fine. Sign the consent judgment and if we get further information that proves otherwise, we will have the right to evict you.” She did sign it, and when we gathered more information, we applied for the writ and she was evicted.

\* One member was unable to keep her guest under control. She signed a consent judgment and when he became drunk and disorderly again, we swiftly moved in and got both the guest and member out of the cooperative.

Next time you encounter such problems, think about using this route to avoid lengthy court battles.

\* If your cooperative is approaching the mortgage payoff, there are a number of steps the board should consider taking at this time. These include:

\* The Board needs to be fully informed of the pros and cons of each option available to the cooperative. Especially important is knowing the differences between the co-op form and a condo form. There are several ways of getting such information: MAHC and NAHC put on classes; there is also a “Future of Cooperative Housing” group, of which we are members, that are conducting in-depth forums. Please contact us if interested in information.

\* When the Board makes a decision on its recommendation to the membership, we strongly suggest that it adopt a formal resolution that recites the basis for its determination, including attachments of all materials amassed during the study

period. The reason is to reduce board liability: if the Board relies upon expert advice, it can invoke the “business judgment” rule. Therefore, documentation becomes crucial to defend such lawsuits.

\* Since it is likely that the membership will take a vote on the matter, the Board is well advised to prepare amendments to the bylaws. There are certain issues that should be addressed at such a time:

\* As noted above, you can clean up the bylaws to eliminate clauses that are now invalid - such as the marital discrimination in proxy voting.

\* To avoid future confusion and possible litigation, eliminate references to HUD and the Regulatory Agreement.

\* Fix problems: such a quorum problems - lower it if you have difficulty making quorum for membership meetings; provide for different voting procedures - you may want to “legitimize” the practice of many co-ops that require candidates to declare prior to the actual annual meeting and bar nominations from the floor; or require any motions that will be made at the annual meeting to be submitted in writing prior to that date. You may also want to allow for absentee voting ballots, or day long voting.

\* It is advisable to make sure you have a clean title to all of the properties owned by the cooperative. This can be done through the co-op attorney with the services of a title company. By doing so, you avoid the embarrassment of making decisions on the corporate assets which may be encumbered by some cloud. Some issues we have uncovered by doing this research include:

\* a street in the co-op that never was properly conveyed by the original developer.

\* a cloud created by a stray deed from a member’s attempt to put his shares into a trust.

\* an old lien placed by a contractor that did work for a member and did not get paid.

If you need help on any of these matters, please call us.

\* Rethink the membership selection process. Since 9/11, there has been heightened scrutiny to make sure there is no ethnic or national origin discrimination. Check your forms and checklists to ensure that you do not require information that violates the federal laws on this. What may be legitimate and indeed required of employers may not be a valid area of inquiry for housing cooperatives. EEOC and the Michigan Department of Civil Rights is actively examining some cooperatives for possible violations. Beyond the forms and checklists, of course, are the interpersonal contacts that occur with

applicants. Consider ways to reduce your exposure by making the process occur on paper as much as possible, rather than through interviews. The more objective and uniform the criteria, the better.